markets, clearance rates are lower than they would have been under network distribution.[52] The lower clearance rate would lead to a smaller aggregate audience, and consequently lower total expenditures per program.[53]

Expenditures on programming represent a dimension of competition. A network can increase its profits if it can successfully avoid competing with other networks, and a broadcast television station can increase its profits if it can avoid competing with other local broadcasters. If, for example, there were only three television stations in a local market competing for viewers by spending money to enhance the attractiveness of their programming, those stations potentially could profit if they could agree to jointly reduce their expenditures on this programming. Total viewing would decline (as marginal viewers turned off their sets) as would advertising revenues,[54] but total profits would nonetheless increase if the reduction in programming expenditures more than offset the loss in advertising revenues.

While we lack the data necessary to determine whether programming expenditures declined following PTAR's adoption, an inspection of prime time programming in the access period in the Top 50 markets does appear to support certain aspects of the critics' predictions. It appears that programming airing during the access period differs substantially from that

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[52] Were a syndicator able to achieve the same clearance rate as a network, then there would be no necessary diminution in program expenditures. However, were this to occur, the principal effect of the rule would have been to replace the old network with a de facto new network.

[53] See Besen et al., supra note 29, p. 142. As Besen et al. note, the access period came to be dominated by shows that were inexpensive to produce by prime time standards, such as game shows and talk shows.

[54] The stations also could increase their joint profits if they could successfully collude to raise the price of their advertising time.

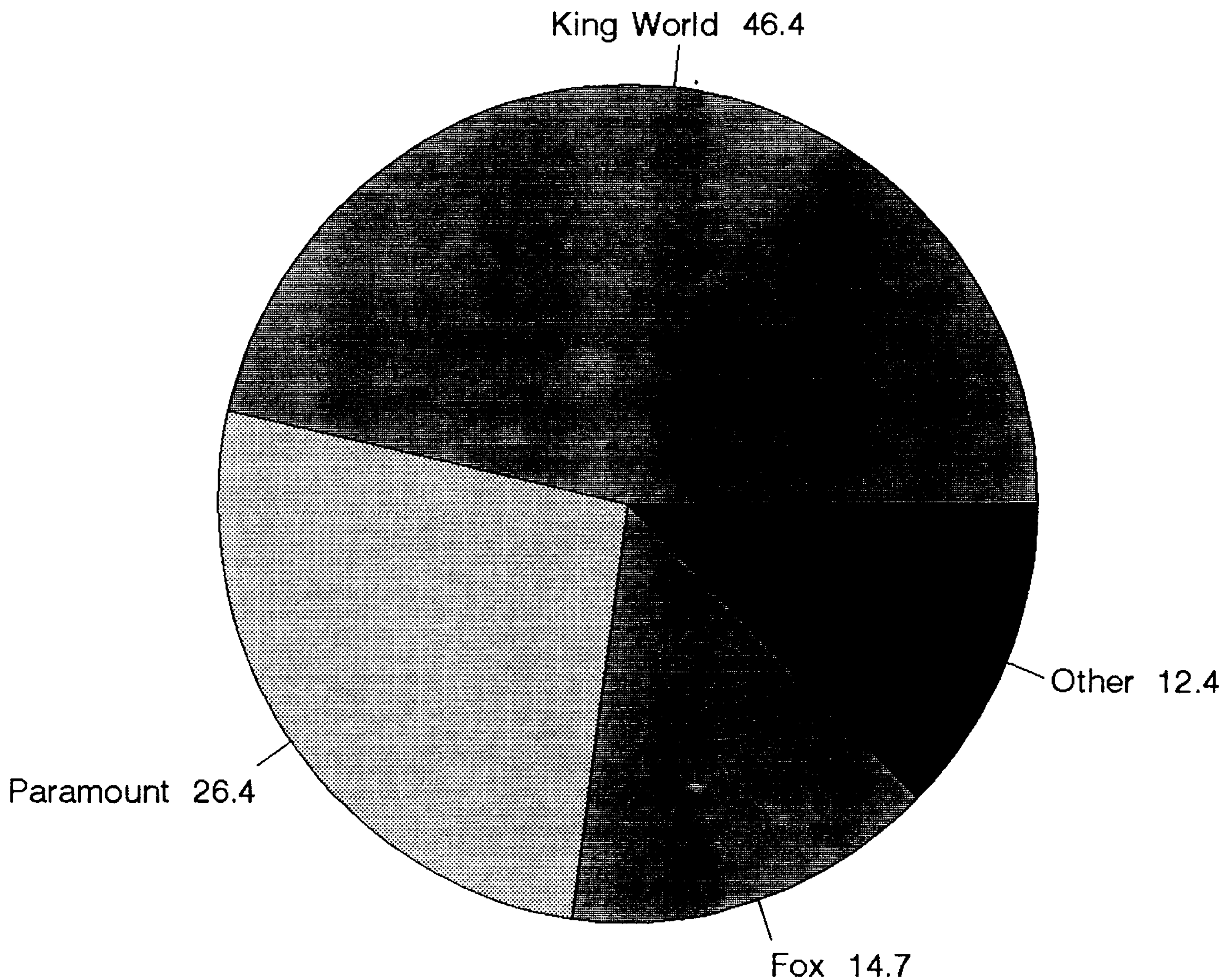
televised during the remainder of prime time.[55] Game shows, which (with a few exceptions) had largely disappeared from prime time by the 1960s,[56] account for over 25 percent of the 300 half-hour weekday time slots governed by the rule.[57] See Figure 1. Another 40 percent of these slots consist of so-called "tabloid" programs (A Current Affair, Inside Edition, American Journal, Hard Copy, and Entertainment Tonight). If one computes shares based on syndicated programming shown in the access period time slot (i.e., by removing from the denominator the portion of the period used for local and national news), the shares of game shows and tabloids are over 35 and 50 percent, respectively.

[55] Excluding network and local news, a complete list of the programs shown by Top 50 network affiliates in the access time slot is as follows (name of syndicator appears in parentheses): American Journal, Inside Edition, Jeopardy, Wheel of Fortune (King World); Entertainment Tonight, Hard Copy, Star Trek: Next Generation (Paramount); Cops, Current Affair (Fox); Love Connection, Mama's Family (Warner Brothers); Married With Children (Columbia); Real Stories of the Highway Patrol (Genesis); Rescue 911 (MTM/IFE); Family Feud (All American).

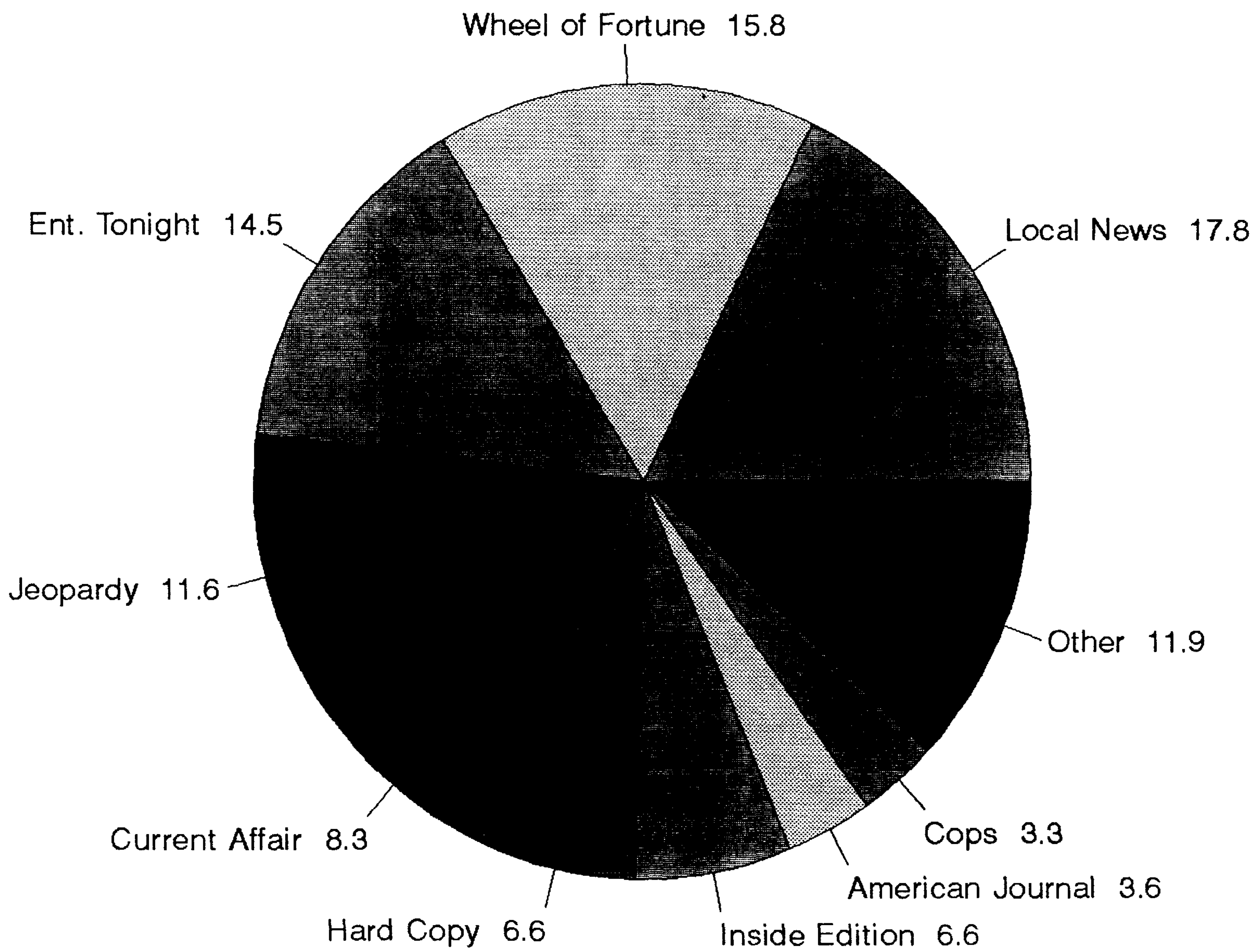
[56] See Dominick and Pearce "Trends in Network Prime-Time Programming, 1953-74," Journal of Communications 26 (1976), pp. 70-80.

[57] Wheel of Fortune and Jeopardy account for most of these programming hours. The Network Inquiry Special Staff Report (supra note 31, p. 737) also noted that as of 1980, "[b]y far the most successful vehicle in the access period has been the game show."

% of Syndicated Access Period Time Slots, by Syndicator



Percentage of Half-Hour
Access Period Time Slots, (M-F)



The data also are consistent with the prediction that the economies of program distribution would lead to the formation of surrogate networks of syndicators that would dominate the access period just as it had previously been dominated by the three established networks.[58] As Figure 2 shows, the three largest syndicators (King World, Paramount, and Fox) account for about 88 percent of the total Top 50 syndicated access period hours.

These data permit a few additional observations. If the FCC intended the access period to consist of syndicated programming similar in format to that appearing in the remainder of prime time (i.e., dramas, comedies, and documentaries), this objective has not been fulfilled.[59] It is possible, however, that even though access period syndicated programming has not come to resemble the programming in the remainder of prime time, the PTAR might have had indirect effects consistent with the rule's objectives. For example, it could be conjectured that the firms whose shows are syndicated for the access period also syndicate dramas for first run prime time exhibition on independent stations and that these producers would not be competitively viable producers of the latter without the protections afforded by the PTAR.

The current data on syndicated programming do not provide much support for this conjecture. The largest syndicator of programming (in terms of audience share), both in total and for the access period, is King World. King World syndicates a mixture of game and "tabloid" shows for the access period.[60] For the non-access period, it syndicates The Oprah

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[58] See Crandall, supra note 28, p. 406.

[59] The Special Staff Report (supra note 31, p. 737) argues that this was a goal of the PTAR. The Report concluded that as of 1980, "nothing approaching a typical prime-time situation comedy or dramatic series has been produced successfully for the access period."

[60] See note 55, supra.

Winfrey Show, Rolanda (a talk show), and the weekday version of Wheel of Fortune. None of these are typically aired during prime time.[61] Of the next largest access period programmers (Fox and Paramount), only Paramount syndicates programs (Star Trek: The Next Generation and Star Trek: Deep Space 9) that would appear to qualify as first run prime time programming.[62] Both Paramount and Fox are (and were at the time of the PTAR's promulgation) well established producers of motion pictures for theatrical exhibition as well as programming for prime time network exhibition.[63] It is difficult to argue that it is either necessary or desirable (from a competition policy perspective) to maintain programming regulations to ensure their competitive viability. As the FCC noted in 1970, the objective of the PTAR was not to "carve out a competition-free haven for syndicators" or to "smooth the path for existing syndicators."[64]

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[61] This list is derived from viewership data on the Top 50 syndicated programs for the week of April 30, 1994.

[62] Paramount also syndicates Cheers (an off-network program), The Maury Povich Show, and The Arsenio Hall Show. Fox syndicates M*A*S*H (an off-network program) and The Beatrice Berry Show. We note also that two of King World's access period programs (Jeopardy and Wheel of Fortune) are produced by a joint venture between Merv Griffen Enterprises and Sony Corporation's Columbia TriStar division. Our data do not show the former producing any syndicated programming for non-access period prime time; the latter is a major picture producer, as well as a supplier of first-run programming to the three major networks and the Fox network.

[63] In 1970, prior to the adoption of PTAR, Fox, Paramount, and Columbia were the second, third, and fourth largest producers (respectively) of programming for prime time network exhibition.

[64] 23 F.C.C. 2d 382, 397.

D. Providing Independent Stations With a Competitive Advantage Over Network Affiliates

According to the NPRM (§ VI.C), one possible effect of the rule may have been to alter the competitive position of network affiliates so as to make rival independent broadcasters more attractive to viewers.[65] As the NPRM (¶ 45) states, PTAR is said to

> provide independent stations with a competitive advantage over competing network affiliates. Specifically, since Top 50 Market Affiliates have a more limited range of choices in placing programming on their stations, the independent stations receive two competitive advantages: (a) less competition for viewers, and (b) less expensive programming. The rationale for giving these advantages has been explained as a correction for inherent competitive disadvantages shouldered by independent stations, such as the technological impediments they face by virtue of the fact that most of them have been relegated to the UHF band.

If the PTAR resulted in a reduction in the quality of programming offered by incumbent affiliates, it may have encouraged entry that otherwise would not have occurred. If a firm (or group of firms) reduces its quality below competitive levels, it may become profitable for producers of (imperfect) substitute goods to enter the market, even though such entry would not have been profitable had the incumbents' quality remained at the competitive level. From a competition policy perspective, this entry would not necessarily be viewed as evidence of desirable market performance — the opposite may be true.[66]

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[65] The Network Inquiry Special Staff Report (supra note 31, pp. 253-55) discusses how a PTAR-induced joint reduction in affiliates' expenditures on prime time access period programming may have actually increased affiliates' profits. See also Besen et al., supra note 29, p. 142.

[66] For example, had the quality decrease resulted from the exercise of market power, viewing subsequent entry as evidence of robust market competition would be tantamount to committing the "Cellophane fallacy." This fallacy derives is name from an antitrust case in which the Supreme Court reasoned that the presence of good substitutes at current prices for an allegedly monopolized product (in that matter, cellophane) meant that the alleged

Competition policy views entry as a means to an end, rather than an end in itself.[67] Whenever possible, competition policy seeks to create or preserve conditions that allow entrants to respond to profit opportunities arising from the entrants' better products or lower costs. The principles of competition policy would not be served were the PTAR's effects mainly to attenuate the efficiency of incumbent broadcasters (unless this somehow produced a more-than-offsetting benefit).

It would probably be incorrect, however, to attribute the post-rule growth[68] in the number of broadcasters to PTAR-induced inefficiency.[69] A far more plausible explanation is the reduction of the technological disadvantage of UHF broadcasters. As noted above, network affiliates historically enjoyed an advantage over potential entrants because the former usually are located on the VHF band, which has superior over-the-air reception and coverage

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monopolist had no meaningful market power. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956). As numerous commentators have since pointed out, it may well be that it is the exercise of market power that brings the monopolized product into competition with less attractive substitutes.

[67] We recognize that the FCC is not concerned solely with the principles of competition policy; accordingly, there may be circumstances under which the FCC does value entry for its own sake. See NPRM, paragraph 33.

[68] Since 1970, the number of commercial VHF stations has increased by about 10 percent (from 501 to 552 in 1992). The number of commercial UHF stations has increased from 176 to 585. See 1994 Television & Cable Factbook, supra note 44, p. I-7. Most (121 of 140) of Fox's affiliates are UHF broadcasters. 1994 Television & Cable Factbook, p. G-65.

[69] The rule may nonetheless marginally improve independent stations' profitability. According to the NPRM (¶ 27), the Association of Independent Television Stations ("INTV") has advocated retention of the PTAR on the grounds that repeal would allow network affiliates to outbid independents for the exhibition rights to off-network programming.

properties compared to channels on the UHF band.[70] As the NPRM observes (¶ 46), however, this disadvantage has been reduced considerably with the growth of cable television, because wire-distributed UHF signals are equal in reception quality to wire-distributed VHF signals. In all likelihood, it has been the growth of cable, more than any other factor, that has facilitated the entry of new commercial television stations, and the formation of new advertiser-supported broadcast television networks, such as Fox.[71]

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[70] See Federal Communications Commission, Network Inquiry Special Staff Report New Television Networks: Entry, Jurisdiction, Ownership, and Regulation (vol. I) (October 1980), pp. 69-78. Because of the limited amount of spectrum made available for VHF broadcasting, and the necessity of geographically separating signals to prevent interference, there have been limited opportunities for entry by new VHF stations. Network Inquiry Special Staff Report (vol. I), pp. 41-58.

[71] To assess the factors contributing to broadcast station growth, we regressed the number of commercial television stations on-the-air in each year between 1952 and 1992 on the following variables: total population (POP), real per capita income (REALPCY), total cable subscribership (CABLESUB), and a dummy variable (PTARDUM) equal to one for years in which the PTAR was in force. Of these variables, only the coefficient on CABLESUB was statistically significant (coefficient = 0.0102; t-statistic = 4.3; significantly different from zero at the 1% level). This finding is consistent with the view expressed in Setzer and Levy (i.e., the growth of cable made possible the expansion in the number of broadcast television stations by increasing the potential audiences of UHF stations), "Broadcast Television in a Multichannel Marketplace," FCC OPP Working Paper No. 26, June 1991, pp. 17-18, and with the early predictions of Park, "Cable Television, UHF Broadcasting, And FCC Regulatory Policy," Journal of Law and Economics, 15 (1972), 207-232.

VI. Conclusion

The NPRM outlines three possible effects for the PTAR: (1) strengthening independent program suppliers; (2) reducing the networks' role in dictating programming choices; and (3) strengthening the position of independent broadcasters.

We cannot conclude that competitive performance in the market for television programming would be threatened were the PTAR to be eliminated. Networks and their affiliates have considerable mutual incentives to televise programming that will be attractive to audiences and therefore valuable to advertisers. In any event, the major networks are now subject to greater competitive constraints than they were at the time of the rule's adoption. As for the third hypothesized effect, if the PTAR helped independent broadcasters by imposing inefficiencies on network affiliates, that effect could be inconsistent with competition policy. Moreover, in our view, factors other than PTAR, such as the emergence of cable television systems, are likely far more important contributors to the current strength of the independent broadcasters.

The NPRM states that the FCC intends to evaluate the PTAR according to a 'public interest' standard that seeks to maximize consumer welfare, as opposed to merely protecting individual competitors in the communications industry. When assessed by this standard, justification for the continuation of the rule is questionable.